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# In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1108

WILLIAM S. GIRARD, PETITIONER

*v.*

CHARLES E. WILSON, ET AL., RESPONDENTS

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS *

### OPINION BELOW

The opinion of the District Court has not yet been reported. The opinion and order of the District Court are printed as Appendix B (pp. 38a–51a) to the brief for the Petitioners in No. 1103, this Term.

### JURISDICTION

The order of the District Court denying the petition for a writ of habeas corpus but granting declaratory relief and an injunction was entered on June 18, 1957. Petitioner appealed to the Court of Appeals for the District of Columbia from that part of the order

* This brief deals only with the narrow issue raised in petitioner Girard's brief in this case, No. 1108. The major issues involved in this litigation are dealt with in the brief of petitioners (respondents here) in No. 1103, this Term.

which denied the petition for a writ of habeas corpus. After respondents had sought certiorari before judgment in the Court of Appeals on their appeal, petitioner also sought certiorari before judgment on his appeal. Both petitions were granted on June 21, 1957, and the cases consolidated for argument. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

## QUESTION PRESENTED

Whether it was error for the District Court, upon ascertaining the nature of petitioner's contentions and the relief desired, to refuse to order petitioner's outright release, to treat petitioner's application for a writ of habeas corpus as an action for a declaratory judgment and injunction, and to fashion relief accordingly.

## STATUTE INVOLVED

28 U. S. C. 2243 provides:

> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.
>
> The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.
>
> The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

## STATEMENT

In his petition for a writ of habeas corpus, filed on June 6, 1957 (Appendix, *infra*, pp. 15–19), petitioner alleged that he was in the military service of the United States, and that on or about January 30, 1957, he had been arrested and thereafter held in confinement for the purpose of being delivered to the government of Japan for trial. Claiming that he could not validly be turned over to the Japanese government, petitioner sought his production before the court to inquire into the validity of his restraint and "such other further and equitable relief" as the court should deem proper.

Respondents in their return (Appendix, *infra*, pp. 19–22) alleged *inter alia* that petitioner's term of enlist-

ment was not due to expire until October 27, 1957[1] and that petitioner was "on a normal duty status restricted by military orders to the military base of Camp Whittington." At the hearing petitioner did not claim that he was entitled to be released from the army and did not contend that he would not be subject to trial by court-martial. His basic contention was that it would be a violation of his rights to allow the government of Japan to try him in its courts.

The District Court held that the administrative restriction of petitioner to the limits of the camp was sufficient restraint for the purposes of habeas corpus, but that, since petitioner would remain a member of the United States armed forces in Japan and might be prosecuted in court-martial proceedings, the petition for the writ of habeas corpus would be denied. Treating the petition as one for declaratory judgment and injunctive relief, the court enjoined respondents

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[1] Petitioner, while at all times stating that he was in the military service, originally alleged that his last term of enlistment had expired on February 12, 1957. That claim was dropped in his Reply to Return and Answer to the Rule to Show Cause (Appendix, *infra*, p. 22), which stated that it was on that date that he was to have been returned to the United States (presumably for rotation). In this Court, both the petition for certiorari in No. 1108 and the petitioner's brief agree that petitioner is currently a soldier in the United States Army and make no issue over any alleged termination of his enlistment or any obligation to be returned to the United States on rotation or otherwise. His service record shows that his enlistment in the Regular Army will expire on October 27, 1957. See the petition for a writ of certiorari in No. 1103, Appendix C, p. 54a, and Government Exhibit No. 3 in the record in that case.

from delivering petitioner to the Japanese government.

## SUMMARY OF ARGUMENT

In this proceeding, petitioner complains only of the fact that the District Court, although granting him injunctive relief, denied the petition for a writ of habeas corpus. Assuming that the District Court was correct on the merits, the relief which it granted was appropriate.

1. At the hearing before the District Court, it became evident that petitioner was not really seeking relief from custody; he was seeking to prevent future executive action allowing him to be tried by the Japanese authorities. The injunctive relief granted was thus the only suitable remedy if his claim was valid.

2. Even if traditional habeas corpus forms had been followed, the result would not have been different. A court has power to fashion relief as "law and justice require".

## ARGUMENT

This case has been consolidated with No. 1103, this Term, which raises serious questions as to the correctness of the decision below and whether the District Court properly enjoined respondents here from delivering petitioner to the Japanese Government. The sole issue raised in this case, No. 1108, is as to the District Court's failure to order petitioner's release. If the Government prevails in No. 1103, there will of course be no merit to petitioner's claim in this case. But in any event we believe there is no substance in petitioner's position. The writ of habeas corpus was not an appropriate remedy under the circumstances

of this case, and, if it were, the relief granted by the District Court relieved petitioner of that custody of which he complained.

1. *Habeas corpus was not an appropriate remedy under the circumstances of this case*

Assuming, as we do, that petitioner's being restricted to the base was sufficient restraint for habeas corpus (but see *Wales* v. *Whitney*, 114 U. S. 564), and that the District Court had jurisdiction to issue the writ for a person in Japan,[2] nonetheless, release from Camp Whittington was not the relief which petitioner desired. Petitioner was not seeking his release from the custody of the army; he was not seeking transfer from one authority to another (such as from military to civil jurisdiction), as in the cases he cites. He was not even seeking a revision of the custody in which the army was then holding him since he was not challenging the right to be administratively confined for grounds other than for transfer to the Japanese government. Rather, he was seeking to have

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[2] In view of the disposition of the case by the District Court, and for the reasons stated in the text, there is no need to consider the question of whether habeas corpus is available to test the detention of an American held by American authorities in Japan. Under 28 U. S. C. 2241, writs of habeas corpus may be granted by district courts only "within their respective jurisdictions". In *Ahrens* v. *Clark*, 335 U. S. 188, the Court found that this limitation referred to the territorial jurisdiction of each court, and held that the District Court for the District of Columbia did not have jurisdiction to issue a writ with respect to prisoners on Ellis Island, New York. But that decision, as well as subsequent decisions of this Court, have left open the question of whether a different result would be reached where United States citizens

himself retained in, not transferred out of, the very detention in which he was being held.[3]

The function of the writ of habeas corpus is to bring about release from custody. This Court said in *McNally* v. *Hill*, 293 U. S. 131, 137, that there is "no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention, * * *". As was pointed out in *Orloff* v. *Willoughby*, 345 U. S. 83, 93, it is not the function of the writ to revise duty orders of one lawfully in service.

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were being held in custody by United States officials overseas, outside of the jurisdiction of any district court.

Even if this were still deemed a strict habeas corpus proceeding, the Court need not reach the question of whether the District Court for the District of Columbia has jurisdiction to grant a writ of habeas corpus for a person who at all relevant times has been in Japan. As shown in our brief in No. 1103, the merits of the case are clear. And if the merits are clear, it is permissible to pass over a jurisdictional problem of greater difficulty where the resolution of that issue would not change the result. See *Brooks* v. *Dewar*, 313 U. S. 354, 359–360; *Johnson* v. *Eisentrager*, 339 U. S. 763, 790–791; *Secretary of Agriculture* v. *Central Roig Ref. Co.*, 338 U. S. 604, 619–620.

If the Court should feel it necessary to reach the jurisdictional issue, the Government's present position is that the implications of the ruling of this Court in *Reid* v. *Covert*, No. 701, October Term, 1955, decided June 10, 1957, as well as of other decisions subsequent to *Ahrens*, militate against any construction of 28 U. S. C. 2241, *supra*, which would deprive an American citizen overseas of the constitutionally-protected remedy of habeas corpus, where the requirements of custody are shown.

[3] The validity of a detention questioned by a petition for a writ of habeas corpus is to be determined by the conditions existing at the time of the final decision thereon (*Mensevich* v. *Tod*, 264 U. S. 134, 137) and not merely on the basis of the original allegations.

As noted, the only restraint to which petitioner objects is that he is restricted to Camp Whittington—and he does not in fact object to that restraint but only to its purpose. For if peitioner were to leave the base he could at any time be taken into custody by Japanese authorities—the very custody from which he seeks to require the United States to protect him. Petitioner thus sought not freedom to travel within Japan, but rather the protective custody of the United States. Petitioner was calling for affirmative action by the United States armed forces to protect his alleged right to be a fugitive from Japanese justice. This was granted by the District Court.

Petitioner could not, and does not, complain of restriction to the base for other reasons. Certainly, the courts will not review on habeas corpus the right of a commanding officer to deny a pass to a soldier for whatever reason he sees fit. But, to repeat, the substance of petitioner's complaint was that action was about to be taken to change his custody which would, he alleged, violate his constitutional rights and for which damages would not be an adequate remedy. The court therefore properly treated the petition as one for declaratory and equitable relief.

2. *The relief granted by the District Court relieved petitioner of the custody of which he complained*

In any event, even if the district judge had acted within the precise framework of the habeas corpus proceeding, the actual result would be no different from the one presently ordered. Petitioner himself admits that the statute, 28 U. S. C. 2243, gives a court power to "dispose of the matter as law and justice

require." This Court has many times held that, under such power, a district court may withhold the issuance of the writ pending corrective action by other courts or by administrative authority. See *Tod* v. *Waldman*, 266 U. S. 113, 118, where this Court ruled specifically that the lower court should not have directed the discharge of excluded aliens who had been denied a fair hearing, but should have ordered their discharge only if a proper administrative appeal were not granted within 30 days. See also *Dowd* v. *Cook*, 340 U. S. 206; *Mahler* v. *Eby*, 264 U. S. 32, 46; *In re Bonner*, 151 U. S. 242, 261. Habeas corpus does not require the immediate discharge of a prisoner; the court may frame some other order appropriate to the circumstances. *Chessman* v. *Teets*, No. 893, this Term, decided June 10, 1957. Hence, even on petitioner's theory that relief should have been granted in the habeas corpus proceeding as such, the District Court was not obliged to order petitioner's immediate discharge from the custody in which he was being held; the court was free to issue any appropriate order which would insure petitioner that the custody in which he might be held would be legal, not illegal.

The only illegality alleged by petitioner as to his restraint was that he was being restrained "for the purpose of being delivered over to the government of Japan." Se Paragraphs 2 and 3 of the Petition for Writ of Habeas Corpus, *infra*, p. 16. By enjoining petitioner's delivery, the court removed the sole aspect of the custody of which he complained.

If traditional habeas corpus forms had been followed, the same relief would have been accorded him by directing his release unless he was restricted

to the base for some other reason. But by enjoining the respondents from delivering petitioner to the Japanese Government the court prevented petitioner from being confined for that purpose. If the decision should be affirmed, it is plain that petitioner could no longer be restricted to Camp Whittington except for other reasons—the possible existence or validity of which petitioner does not and cannot challenge.

Petitioner's complaint as to the District Court's remedy is thus wholly one of form, not of substance.

## CONCLUSION

It is respectfully submitted that the order denying the petition for a writ of habeas corpus should be sustained.

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JULY 6, 1957.